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Brief of Kirlin for Appel

SUPREME COURT OF THE UNITED STATES

Filed Apr. 10, 1899.

OCTOBER TERM, 1898

No. 194

James Knott

Respondent-Appellant

against

The Botany Worsted Mills

Libelant-Appellee

The Same

against

Henry P. Winter and others

Libelants-Appellees

BRIEF FOR THE APPELLANT

CONVERSE & KIRLIN

Proctors for Appellant

J. PARKER KIRLIN

Advocate

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Supreme Court of the United States,

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JAMES KNOTT,
Respondent-Appellant,

AGAINST

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BRIEF FOR APPELLANT.

Statement.

The above causes come before the Court by virtue of writs of *certiorari* issued to the United States Circuit Court of Appeals for the Second Circuit, December 7, 1897 (Rec., p. 57).

The libels were filed in the Southern District of New York to recover damages for injury to certain bales of wool, whilst on a voyage from Buenos Ayres, Argentine Republic, to New York, in respondent's

steamer *Portuguese Prince*. The voyage was begun December 21, 1894, and ended about March 30, 1895. The damage was caused by the drainage of wet sugar from an adjoining compartment.

The wool was stowed in the forward compartment of the ship, known as the No. 1 between-decks, the space immediately under the top deck and abaft the collision bulkhead (p. 16). The between-deck space, from the collision bulkhead to the engine-room bulkhead, was divided into two compartments by a temporary wooden partition or bulkhead. That part of it forward of the wooden partition is called, in the testimony, the No. 1 between-decks, and that part abaft and between it and the engine-room bulkhead is called the No. 2 between decks. The wool was in bales stowed on end and properly dunnaged off the deck with deals about 2½ or 3 inches thick p. 17). It extended from the collision bulkhead aft to within about ten feet of the temporary wooden partition dividing this space from the No. 2 between-decks. The ten feet of space right across the ship between the wool and the bulkhead was left vacant (p. 17). The dunnage under the wool was in excess of the customary amount (p. 17).

The wooden bulkhead between the No. 1 and No. 2 between-decks was not tight and was not intended to be so. It was supplied with doors, affording access from one compartment to the other (p. 17). There is no rule requiring any bulkhead at this place. There is nothing in the record in any way contradicting the respondent's testimony that the wool was properly stowed and dunnaged and was put in a proper place at Buenos Ayres (pp. 17, 21).

The bills of lading issued for the wool (Exhibits B and C) accorded a privilege to the steamer to trade at intermediate ports as follows:

"With liberty * * * to call at any port or ports in or out of the customary route" (between Buenos Ayres and New York) "in any order, to receive and discharge * * * cargo * * * and for any other purpose whatever; and with liberty to

carry goods, or horses, cattle, sheep, or other live animals, on deck or elsewhere, in the said ship, and to carry goods of all kinds, dangerous or otherwise."

The ship sailed from Buenos Ayres December 25, 1894. After calling at Santos, Rio de Janeiro, Bahia and Maceo, she arrived at Pernambuco February 19, 1895 (p. 29). At this port sugar was stowed in the No. 2 between-decks (p. 28). This was green sugar in bags, and about two hundred tons of it were placed in the No. 2 between-decks, extending from the engine-room bulkhead forward to within 25 or 30 feet of the wooden bulkhead above mentioned. The bags were stowed in tiers properly dunnaged with 3-inch deals, and hatch covers under the whole of it (pp. 16, 17).

This mode of stowage left between the sugar and the temporary bulkhead a space of from 25 to 30 feet in which there was no cargo (p. 16). Counting the space of ten feet between the bulkhead and the wool in the No. 1 between-decks (p. 17) it was 35 or 40 feet from the sugar to the wool.

The between-deck under the wool and sugar was of iron (p. 19). It was drained by four scupper pipes leading to the bilges in the lower hold. One of these scuppers was located on the port and one on the starboard side in the after part of the No. 2 between decks, just forward of the engine room bulkhead (p. 18). The other two were abreast the foremast, one on each side, just forward of the temporary bulkhead (p. 19). These scuppers were of large size, the vessel having been originally built for the cattle trade (p. 18).

On leaving Pernambuco, February 24, 1895, the draught of the ship was 21 feet 6 inches forward, and 22 feet 4 inches aft, or 10 inches by the stern (p. 29). In this trim the drainage from the sugar flowed down the two after scuppers to the lower bilges (pp. 19, 20).

The next port of call was Para, where the ship

arrived March 3, 1895, her draught then being 21 feet 3 inches forward and 21 feet 9 inches aft, or 6 inches by the stern (p. 29). During this voyage, the weather was continuously fine (Log, pp. 31–37).

At Para she discharged cargo, but took none in (pp. 37–38). On the 4th of March, she discharged from the No. 2 and No. 3 holds (No. 3 being abaft the engine-room). On the 5th she discharged from the No. 1 and No. 4 holds; on the 6th from the No. 5 hold and lazarette, and from Nos. 1 and 2 holds; on the 7th two gangs forward and one gang worked aft. The place from which she discharged on the 8th of March is not stated. On the 9th of March she discharged with one gang forward and one aft, finishing the Para cargo forward and starting on the No. 5 lower hold. On the 10th of March she discharged from No. 4 and No. 5 holds, and at 5.30 P. M. finished unloading all Para cargo (Log., pp., 37, 38). No cargo was laden at this port.

At 8 P. M. of the 10th, the ship sailed for Port of Spain, Trinidad (pp. 38, 29). Her draught on sailing was 19 feet 6 inches forward and 17 feet 6 inches aft, or 2 feet *by the head* (p. 29).

At Port of Spain, March 13–18, the ship was again by the stern. She left there drawing 18 feet forward and 19 feet aft (p. 29).

In lieu of the examination of the officers of the ship, it was stipulated between the parties as follows:

"Wet sugar was stowed in the No. 2 'tween-decks at Pernambuco. There was a wooden bulkhead, not tight, between this place and the forward or No. 1 'tween-decks, in which libelant's wool was stowed. There was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para, as shown in the official log which is offered in evidence. It was damaged by sugar drainage finding its way through the bulkhead and reaching the wool at Para, or between Para and Port of Spain. After the ship was again trimmed by the stern at Port of Spain, none of the

drainage from the sugar found its way into the forward 'tween-decks. The Court may draw inferences" (p. 28).

The libelants produced no evidence of fault in the stowage either of the wool or of the sugar. Respondent's evidence, as to the proper stowage of each, at the time and place of stowage, is uncontradicted. It stands conceded on the record that the mode of stowage was sufficient and proper after the sugar was laden at Pernambuco, during the voyage thence to Para, and at Para (or afterwards) until the drainage ran forward, owing to the improper trim of the ship 2 feet by the head.

It thus appears, (*a*) that the wool was properly placed and stowed at Buenos Ayres; (*b*) that the sugar was properly placed and stowed at Pernambuco; (*c*) that the wool went in safety from Pernambuco to Para, the ship being then in proper trim; (*d*) that sugar drainage damaged the wool while she was in improper trim between Para and Port of Spain; (*e*) that there was no further damage after the trim was again put right in Port of Spain.

It was testified that the master should not have allowed the ship to be trimmed by the head without moving either the wool or the sugar to the afterpart of the ship (pp. 20, 21).

The bills of lading under which the wool was carried contained the following paragraph of exceptions:

"The Act of God; the Queen's enemies; pirates, robbers of whatever kind, whether on board or not, or by land or sea; barratry or *negligence of masters or mariners*; adverse claims, restraints of Princes, Rulers or people; loss or damage, resulting from effects of climate, heat of holds, vermin, rain, spray, insufficiency in strength of wrappers and packages, non-marking, obliteration, or insufficiency of marks, and all injury to the same, sweating, rust, natural decay, leakage, or breakage, and *all damage arising from* [*to*] *the goods by stowage*, or *contact with, or* by sweating, *leakage*, smell, or evaporation from them,

or from the leakage, or flow of, or from contact with, the urine, manure, water, or drainage of horses, cattle, sheep or other animals carried on the said ship, or from their stalls, however caused, or otherwise howsoever, or from errors, obliterations, or other insufficiency or absence of marks, numbers, addresses, or description of any goods shipped, risk of lighterage, to or from the vessel, risk of craft or hulk, or storage or transhipment, or transhipment from or to craft, explosion, heat, fire before loading, or in the ship, or after unloading, or at any time and place whatever, boilers, steam, or machinery, or their appurtenances, or from the consequences of any damage, breakdown or injury to, or defect in hull, tackle, boilers or machinery, or their appurtenances, refrigerating engine chamber, or any part thereof, outfit, tackle, or other appurtenances, however such damage, defect, or injury may be caused, and notwithstanding that the same may have existed at, or at any time before the loading or sailing of the vessel; collision, stranding, straining, jettison of any kind, including jettison or washing overboard of cattle, or goods carried on deck, or any other peril of the Seas, Rivers, Navigation, or of Land Transit of whatsoever nature or kind, *and whether any of the perils, causes or things above-mentioned, or the loss or injury arising therefrom, be occasioned by the wrongful act, default, negligence or error in judgment of the owners, masters, officers, marines, crew, stevedores, engineers, and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before, or after, or during the voyage, or for whose acts the shipowner would otherwise be liable*, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness or by any cause whatever excepted."

It also contained the following clause:

"8. This contract shall be governed by the law of the flag of the ship carrying the goods, except that general average shall be adjusted according to York-Antwerp Rules, 1890."

The *Portuguese Prince* is a British ship (Libels, pp. 1, 18). It is admitted in the answer to the seventh

interrogatory (pp. 7–8) which stands as the answer of both libelants (p. 14) that the English law permits shipowners "to make contracts which exempt them from liability for the negligence of their servants in loading, stowage and carriage of goods."

There were no "allegations of fact upon which the libelant relies in support of this suit" in either libel, which in this failed to comply with Admiralty Rule No. XXIII. of this Court. In their answer to interrogatories, however, the libelants stated the following particulars of fault:

(1.) The flow of drainage from the sugar forward upon the wool, due to the vessel being out of proper trim (p. 7).

(2.) The temporary bulkhead between the No. 1 and No. 2 between-decks was not tight (p. 7).

(3.) The improper stowage of the wool in a place where the drainage of the sugar could reach it (p. 7).

(4) Unseaworthiness as to said cargo in the place where it was stowed (p. 7).

Respondent invoked in his defense:

(*a*) The above exceptions in the bill of lading, as construed under British law, and

(*b*) (In the alternative) the provision of the third section of the Harter Act, which exempts shipowners from faults or errors in the management or navigation of the ship (pp. 4–5).

The District Judge held:

(1.) "The primary cause of damage was negligence and inattention in the loading or stowage of the cargo, either regarded as a whole or as respects the juxtaposition of wet sugar and wool bales placed far forward" (p. 46).

(2.) That the damage was not due to the "management of the ship" within the Third Section of the Harter Act (p. 46).

(3.) That the express exemptions of the bill of lading, and the stipulation for English law should

not be upheld (pp. 48–49). The decision is reported in 76 Fed. Rep., 582.

The Court of Appeals, in a *per curiam* opinion, held:

(1) That the damage was due to negligence in the loading or stowage of the cargo;

(2) And further, as follows:

"A majority of the Court also concur in the conclusions of the Court below, that the exception in the bill of lading of the liability for 'damage by stowage, * * * though caused by the negligence of the master,' notwithstanding the provision that the contract should be governed by the law of the flag (English), did not relieve the owner of the steamship, such stipulation being against the public policy of this country, and, therefore, not enforcible by its Courts, and approve the decisions in *The Trinacria* (42 Fed. Rep., 863); *The Glenmavis* (69 Fed. Rep., 472); *The Iowa* (50 Fed. Rep., 561)" (p. 54).

Lacombe, Circuit Judge, concurred in the result (p. 56), (82 Fed. Rep., 471). The respondent thereupon sued out this writ.

POINTS.

I.

The loss was within the exceptions of the bills of lading.

The material provisions of the contracts are the following:

"To be delivered in the like good order and condition at the aforesaid port of New York * * * negligence of master or mariners * * * and all damage arising from [to] the goods by stowage, or

contact with, or by sweating, leakage, smell, or evaporation from them * * * however caused or otherwise howsoever * * * or any other peril of the seas, rivers, navigation * * * of whatever nature or kind, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, masters, officers, mariners, crew, stevedores, engineers, and other persons whomsoever in the service of the ship, whether employed on the said steamer or otherwise, and whether before or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning, or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness * * * excepted."

(**a**) Whether the loss be deemed to be due to negligence in loading and stowage, as held in the lower courts (pp. 46, 54), or to the master's omission to shift the wool, when he permitted the ship to be trimmed by the head at Para (pp. 20-21), or to his mismanagement of the ship, in allowing the trim to be changed at that port, so that the drainage, which was intended to pass down the after scuppers, flowed forward on to the wool, it was clearly owing to "*negligence of master or mariners*," one of the excepted causes.

The libelants contend that the loading and stowage were functions of the ship's agents, at the various ports; but the testimony of the Superintendent of the Line on this point is not disputed:

"Q. Whose duty was it, as between the agent and the master in Brazil, to attend to the placing of the cargo in Brazil, its stowage and the trim of the vessel itself?

A. The master's duty" (p. 28).

This is also the law. In *Lawrence* v. *Minturn*, 17 How., 100, Mr. Justice Curtis clearly announced the principle:

"As the quantity of lading and the consequent *trim* and seaworthiness of a vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is instrusted for the benefit of all concerned with a supervision, his failure to do so properly is negligence for which the owner may be liable" (p. 111). "The *master* is bound to use due diligence and skill in stowing and staying the cargo; but there is no absolute warranty that what is done shall prove sufficient" (p. 116).

Faults in stowage are within the exception of "negligence of master and mariners" (The *Duero*, L. R., 2 A. & E., 393).

If the loss was due to the master's failure to shift the wool at Para (pp. 20-21) it would fall within the same principle as fault in the original stowage.

If it should be considered as primarily due to want of care of the vessel, indirectly affecting the cargo, this would be a fault in management or navigation and clearly within the exception of "negligence of master and mariners" (*Fonseca* v. *Cunard S. S. Co.*, 153 Mass., 553; The *Glenochil* (1896), Prob., 10).

(**b.**) In both of the courts below it was considered that the loss was within the exception of "damage by stowage, * * * though caused by the negligence of the master" (Opinion of Court of Appeals, p. 54; of Brown, *J.*, p. 48).

The only question, on this subject, in both Courts, was whether or not the exception should be enforced. It was held that though the contracts, made in Buenos Ayres, provided they should be governed by the law of the ship's flag (British), and though, by that law, the stipulations here referred to were admitted to be valid, they could not be upheld because opposed to the public policy of this country.

II.

The contract should be expounded in accordance with the law selected by the parties to govern their rights. It is not against the public policy of this country for foreigners, in a foreign port, to contract that their rights and obligations under bills of lading shall be governed by the law of the ship's flag. If it were contrary to such policy, that circumstance would not justify a refusal to enforce the contract as respects a breach occurring beyond our jurisdiction.

(1.) The general principle is well settled that where it appears expressly, that the parties have contracted with reference to a foreign law, it is the law of this country that such foreign law, *prima facie* should be applied in expounding the contract (*Wayman* v. *Southard*, 10 Wheaton, 1, 48; *Pritchard* v. *Norton*, 106 U. S., 124, 137; *Watts* v. *Camors*, 115 U. S., 353, 362; *Liverpool Steam Nav. Co.* v. *Phenix Ins. Co.*, 129 U. S., 397, 447; *The Oranmore*, 24 Fed., 922, 928; The *Trinacria*, 42 Fed., 863, 864; see also *Dobell* v. *S. S. Rossmore Co.* (1895), 2 Q. B., 408).

This was clearly laid down in *Pritchard* v. *Norton* (*supra*), where Mr. Justice Matthews, speaking for the Court (pp. 136, 137) said:

"The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, *either expressly* or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat., 48, where he defined it as a principle of universal law. 'The principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea has

been expressed by Lord Mansfield in *Robinson* v. *Bland*, 2 Burr, 1077. 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.' And in *Lloyd* v. *Guibert*. L. R., 1 Q. B., 120, in the Court of Exchequer Chamber, it was said that 'it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter' (*Le Breton* v. *Miles*, 8 Paige, 261).

"It is upon this ground that the presumption rests, that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention.

"So, Phillimore says (4 Int. Law, 469): 'It is always to be remembered that in obligations it is the will of the contracting parties, and not the law which fixes the place of fulfillment—whether that place be fixed by *express words* or by *tacit implication*- as the place to the jurisdiction of which the contracting parties elected to submit themselves.'

"The same author concludes his discussion of the particular topic (4 Int. Law, Sec. DCLIV., pp. 470-471) as follows:

"'As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements.'"

In the case of the *Montana* (*Liverpool* v. *Phœnix Co.*), 129 U. S., 397, Mr. Justice Gray (at p. 548) said:

"This review of the principal cases demonstrates that according to the great preponderance if not the uniform concurrence of authority, the general rule that the nature, the obligation and the interpretation of a contract are to be governed by the law of

the place where it is made, *unless the parties at the time of making it have some other law in view*, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, *unless the parties, when entering into the contract, manifest a mutual intention that it shall be governed by the law of some other country.*"

In *Greer* v. *Poole*, 5 Q. B. D., 272, Lush, *J.*, delivering the judgment of himself, and Cockburn, *C. J.* (p. 274), said:

"It is no doubt competent to an underwriter on an English policy *to stipulate*, if he thinks fit, that such policy *shall be construed and applied in whole or in part according to the law of any foreign state*, as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate, as regards general average."

In *Jacobs* v. *Credit Lyonnais*, 12 Q. B. D., 589, Lord Justice Bowen dealt with the same subject with characteristic breadth of view and good sense. He said:

"It may be that the contract is partly to be performed in one place and partly in another. In such case the only certain guide is to be found in applying sound ideas of business, convenience and sense to the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridical writers cannot therefore be accepted as infallible rules of interpretation in these days when commercial transactions have altered in character and increased in complexity, and there can be no hard and fast rule by which to construe the multiform commercial agreements with which in modern

times we have to deal" (p. 601). "The first matter we have to determine is, whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, *for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts*" (p. 599).

In *Hamlyn* v. *Talisker* (1894), App. Cas., 202, a contract was made in London between an English firm and a Scotch firm, which was to be performed in Scotland, but contained a stipulation that any dispute arising under it should be settled by arbitration, by two members of the London Corn Exchange or their umpire. The Scotch courts held that the arbitration clause was governed by the law of Scotland, inasmuch as that country was the *locus solutionis*, and that the reference, being to arbitrators unnamed, was invalid. The House of Lords reversed this decision, holding that the contract was governed by English law. Lord Watson (pp. 212, 213), said:

"When two parties, living under different systems of law enter into a personal contract, which of these systems must be applied to its construction *depends upon their mutual intention, either as expressed in their contract*, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties; and amongst these considerations, the *locus contractus* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum, and the place of performance in another. In the present case it does not appear to me to be necessary to discuss the relative value of these considerations, because, in my opinion, *the clause of reference is expressed in terms which clearly indicate that the*

parties had in contemplation and agreed that it should be interpreted according to the rules of English law. If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Sessions, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be construed according to these principles." * * * "They (respondents) also contended that the Court of Sessions were not bound to recognize any reference to unnamed arbiters, whatever might be its validity elsewhere, to the effect of excluding their own jurisdiction, because its recognition would be contrary to the policy of Scotch law. Neither of these contentions is, in my opinion, well founded."

In *Miller* v. *Heinrick* (4 Campbell, 155), an English court held that a Russian contract for seamen's wages payable monthly, " subject to the deductions provided for by the agreement of the Russian Marine," was to be governed in that respect by the law so mentioned. In *Este* v. *Smith* (23 Law Journal Chancery, 705), 18 Beavan, 122, it was stated that English subjects on their marriage may stipulate that their rights shall be regulated by the law of a foreign country; and the courts of England will enforce such a contract. Similar in effect are *Byam* v. *Byam* 19 Beavan, 58; *Westlake, Private International Law*, Section 371. In *Van Schaick* v. *Edwards*, 2 Johnson's Cases, 367, Kent, *J.*, held that where it was clear the parties had a view to the laws of another State in the execution of the contract, then undoubtedly the contract was to be governed by such foreign law.

(2.) No sufficient reason appears, in the present case, for refusing to apply the British law in determining the rights of the parties under the bills of lading.

(a.) The contracts were signed abroad. It is immaterial whether or not they were valid in all respects by the law of the Argentine Republic

(though probably they were), because the *lex loci contractus* is never held to prevail where the parties intended some other law to govern their contract. By the express provision for the law of the flag, the Argentine law, as well as our own, was excluded from application (Bond, Circuit Judge, in the *Oranmore*, *post*, Appendix B., pp. 54–55). The contract was in all respects valid by the law in respect of which the parties, in a foreign port, deliberately contracted. The effect is the same therefore, as though the contracts were in fact valid by the *lex loci contractus*.

(**b**.) The parties to the contracts of carriage were foreigners. It is alleged in both libels that the *Portuguese Prince* was a British steamship. In all three of the bills of lading it is recited that the shippers Wantge & Schlief, and Henry Caulliez, were "of Buenos Ayres." The goods covered by the two bills marked Ex. B. (p. 14), being those involved in the Botany Worsted Mills case, were made deliverable "to order." The goods shipped by Caulliez under Ex. C. were consigned to Winter & Smillie. But notwithstanding this fact the contract was with the shipper, who signed the captain's copy of the bill of lading individually (*vide* Ex. C, pp. 28–29). All of the parties to the contracts at the time of shipment were, therefore, presumptively at least foreigners.

(**c**.) The stipulation for the law of the flag was reasonable, and tended to provide uniform rules for the determination of different kinds of possible controversies during the voyage.

The carrying vehicle was a British vessel. The voyage took the steamer into ports of the Brazils, through or by the Windward Islands, to the British port of Port of Spain, and thence to New York. In case of distress she might have put into Danish, Spanish, Brazilian or French ports with slight deviation.

Without this clause in the contracts, what law would, in such case, have been applied to decide

the mutual rights and liabilities of ship and cargo, in the different foreign ports? If by reason of distress a bottomry bond was issued, it may be presumed that any question under the bond would have been determined by the law of the flag (*Pope* v. *Nickerson*, 3 Story, 465, 484-5; *Lloyd* v. *Guibert*, L. R., 1 Q. B., 115; *The Karnack*, L. R, 2 P. C., 505, 512; *The Gaetano and Maria*, 7 P. D., 137; *Liverpool* v. *Phenix Ins. Co.*, 129 U. S., *at p.* 449). In case of damage to the cargo in a British port, by collision with another British vessel, while a compulsory pilot was in charge, the cargo's rights would have been subject to English law (*Smith* v. *Coudry*, 1 How., 23; *The Peerless*, 1 Lush., 30, 40; *The Scotland*, 105 U. S., 24, 29; *The Belgenland*, 114 U. S, 355, 370). But if the collision occurred in a Brazilian or other foreign port, under like circumstances, and the voyage had to be abandoned, the cargo's rights against the carrying vessel would have been liable to be decided by laws that neither party ever thought of as likely to govern their relations.

The law under which the parties in such circumstances would be liable to come might depend on the accident that a suit had to be begun in this or that port for the preservation of a remedy. Surely nothing can be said against the good sense of providing that all the mutual rights of the parties throughout the voyage, and in whatever port, shall be governed by a system of laws they know about and agree to, and which, without their agreement, are bound to be applied in certain possible contingencies. It is merely, in effect, a provision that all the rights during the voyage shall be governed by the law, which, with or without it, would be applied in certain possible contingencies. It is a provision for a uniform system of law, which all must concede is desirable.

It is a mistake to assume that this stipulation is designed merely to evade our law on the subject of negligence exemptions. The clause is now in very general use, not only in bills of lading to this country, but also to others. For example it is proved here that the steamer took cargo from Buenos Ayres to ports

in Brazil; from some ports in Brazil to others in the same country; and from Brazilian ports to New York. The bills of lading are headed: "Prince Line, James Knott, Newcastle-on-Tyne, River Plate and/or Brazils to U. K., Continent, Mediterranean or United States." It is a fair assumption that all the bills used in these various trades are uniform in their provisions. Vessels trading to such a wide range of ports necessarily fall under the scope of widely different systems of laws; and if it is not competent for the shipowner to bargain for Law-of-the-Flag contracts, how can he possibly adjust his freight rates to meet the varying measure of his obligations? The Court must presume the freight has a direct relation to the responsibilities undertaken. The real situation, then, is this. The shipowner, in effect, says: "I do not know the laws of all the countries to which my ships trade, but I will freight your goods on contracts governed by the law of the flag for so much." It is a foreign transaction, valid by the law the parties agree shall govern their rights. Certainly it cannot be said to be immoral or unfair. The shipper is not under the compulsion that in *Ry. Co.* v. *Lockwood*, 17 Wall., 357, was said to exist in cases of railways passing points without competing lines. At every considerable port in the world there is not only the competition of the enterprising "tramp," but also of rival lines and of sailing craft. In every fair commercial sense it is an honorable agreement, to which the parties should be held, in whatever forum their differences may be brought for adjudication (168 U. S., p. 113).

(**d**.) There is nothing in our public policy which pohibits foreigners, or parties contracting abroad from providing that their rights and obligations touching matters done or to be done without our jurisdiction, shall be governed by a foreign law.

The grounds upon which the public policy cases have been rested are (*a*) that upholding negligence clauses would be injurious to one of the parties to the contract; (*b*) that (in railway cases) they are op-

pressive to the whole class of shippers; and (*c*) that they tend to injure the public by encouraging negligence on the part of the carrier's servants. It is doubtful whether any of these is a sound business ground for refusing sanction to these clauses at the present day; (*a*) to do so is equally injurious to the party whose contract is upset; (*b*) in the eager competition for business, especially in maritime commerce, the question is not at all one of oppression, but is one of liberty to contract; and in a large class of cases Congress, by the Harter Act, has given absolution for the most common forms of negligence without even the formality of an agreement; and (*c*) it would be difficult indeed, to prove that carriers' employees are any more careful, or insurance rates any cheaper, in States or countries where these contracts are set at naught, than in those where they are held binding. But taking the law as we find it, the public policy considerations can, at the most, apply only to contracts made here or to be wholly or substantially performed here. They have no just application to contracts made, acts done, or negligence committed wholly without the country. At least, this Court has never said they have, and the drift of certain cases in the lower courts, as well as the reason of the matter tend to that view.

In the *Trinacria*, 42 Fed., 863, and *Baetjer* v. *La Compagnie*, 59 Fed., 789, it was held by Judge Brown that the foreign law governed as to acts done in Italy and France, the ports of shipment, and negligence exemptions covering such acts were in both cases upheld. In the *Trinacria* (*supra*, p. 864) he said:

"The vessel was a British vessel, and the bills of lading excepted loss through negligence by any person in the service of the ship, and loss from leakage, stowage or perils of the seas. As the contract was made in Italy by an English master of an English ship and by an English bill of lading the contract and the exceptions above referred to are valid as respects all acts done thereunder within Italian territory.

"It is no part of the law or policy of this country to invalidate the contracts of parties lawfully made

abroad, *so far as respects performance there*, or to apply our law to the consequences of such performance there, the acts being neither criminal by our laws nor *mala in se*."

The same learned Judge, however, in that case, and in the *Guildhall*, 58 Fed., 796, drew a distinction between negligence in the port of shipment and negligence on the high seas, and in the case at bar between it and negligence at a foreign port of call, refusing in both classes of cases to enforce the contracts. With submission there does not seem to be any substantial distinction between the cases. The alien port of call and the high seas, beyond our jurisdiction, are equally as foreign to us, and our public interests, as the foreign ports of shipment. To acknowledge that our courts can uphold negligence clauses, covering acts done at foreign ports of shipment, concedes the whole point for which the appellant is contending. This was so held in Massachusetts, where the Court applied the foreign law to a case of negligence "on the voyage" and absolved the ship (*Fonseca* v. *Cunard*, 153 Mass., 553).

The other cases in the lower courts (except *Lewishon* v. *National Co.*, 56 Fed., 602, which is opposed to the *Trinacria* and *Baetjer* v. *La Compagnie*, *supra*) rest either upon the ground that negligence clauses coupled with a stipulation for foreign law which would give them validity, cannot be enforced (1) when made in this country (The *Brantford City*, 29 Fed., 573; The *Energia*, 56 Fed., 124; *Brauer* v. *Compania La Flecha*, 57 Fed., 403; The *Iowa*, 50 Fed., 561), or (2) where the negligent act relates to that part of the contract to be performed within our jurisdiction (The *Glenmavis*, 69 Fed., 472).

The vice in the principle on which these cases rest, is that in effect it originates and establishes rights and obligations in respect of the contracts of carriage, which did not accompany their inception (*The Infanta*, Abbott's Adm., 263, 267); and that it permits the libelants who have the right to select the forum, to impose a varying measure of obligation upon the respondent, according to the law of the

place in which he may bring his suit, notwithstanding the provision in the contracts to the contrary.

On the other hand, in The *Oranmore* (24 Fed., 922), Judge Morris, in the District Court, and Judge Bond on appeal (Appendix B, *post*, p. 54), held that a negligence clause in a contract made here, stipulating for English law, and to be performed mainly on the high seas and in England, should be upheld by our Courts.

The contract involved in that case was made in Baltimore, between an American citizen and a British corporation, and provided for the transportation of 320 head of cattle upon a British steamer from that port to Liverpool. The damage complained of occurred upon the high seas, but was alleged to be due to the insufficiency of the cattle fittings. The contract contained a negligence exemption which, if valid, exonerated the ship. In dealing with that class of contract which called for the application of Enlish law, Morris, *J.* (p. 927), said:

"The presumption is that the parties enter into a contract with reference to the law of the place where it is made, but this presumption is easily overthrown by circumstances which show that this was not the intention of the parties (*Whart. Confl. Laws*, 434).

"In *Cox* v. *U. S.* (6 Pet., 203), it is said by the Supreme Court:

" 'The law of the place where the contract is made is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed according to the law where it is to be executed.'

"The present question is not one which affects the capacity of the parties to make the contract. It is not a case in which, according to the American law, it could be said that there is no contract at all binding on the parties.

" It is merely a question of the extent and nature of the obligations and conditions of a contract. The law is thus stated in *Story Confl. Laws*, 242:

" 'Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another coun-

try, for, as we shall presently see, in the latter case the law of the place of performance is to govern.'

"At page 280 he further said:

"'The rules already considered suppose the performance of the contract to be in the place where it is made, either expressly or by tacit implication. But where the contract is expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance.'

"And the author cites as clearly expressing the rule the statement of Lord Mansfield:

"'The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed.'

"In *Whart. Confl. Laws*, 472, it is stated to be a rule fairly deducible from adjudged cases that where there are no other controlling circumstances, a contract of carriage is to be interpreted by the law of the carrier's principal office. In this case, although the contract was made in the United States, it was made in the port of Baltimore by a resident of Chicago with a British corporation for carriage in a British ship to a port in Great Britain, and the express agreement of the parties, deliberately made two months before the shipment, was that any question arising against the carrier under the contract or the bill of lading should be determined by the English law.

"Under all these circumstances, it seems to me the Court should give effect to the clause of the agreement. *It leaves the intention of the parties beyond doubt of any kind, and that intention was to give the provisions of the bill of lading such efficacy as the English courts would give to them.* As I understand the facts of the case and the rulings of the English courts upon similar bills of lading, I think the exceptions cover the injuries sustained by this libelant, and the libel must be dismissed."

An appeal was taken which was heard by Judge Bond, whose findings and conclusions appear from a certified copy thereof in Appendix B to this brief (pp. 54–55).

In *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S., 397, where the conrract was made here,

but the negligence occurred beyond our jurisdiction, the intimations of the Court seem to be that the foreign law would have been applied if the parties had evinced a clear intention in their contract to be governed by it.

Mr. Justice Gray, in delivering the opinion (p. 447), said:

"The general rule as to what law should prevail in case of a conflict of laws concerning a private contract was concisely and exactly stated before the Declaration of Independence by Lord Mansfield (as reported by Sir William Blackstone, who had been of counsel in the case), as follows:

"'The general rule established, *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties (at the time of making the contract) had a view to a different kingdom (*Robinson* v. *Bland*, 1 W. Bl., 234, 256, 258; s. c., 2 Burr., 1077).'"

Again (at p. 461):

"Both parties, or either of them, may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this Court, it was void. In either aspect there is no ground for inferring that the shipper at least had any intention, *for the purpose of securing its validity, to be governed by a foreign law*, which he is not shown, and cannot be presumed, to have had any knowledge of. * * *

"Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country."

There is not to be found in that opinion the slightest intimation that if the conclusion had been that it was "an English and not an American contract" the Court would have declined to enforce it,

for reasons of public policy. The discussion there was not whether the public policy of this country forbids the enforcement of a good English contract, but rather whether it was an English contract. The implications in that and other cases in this court seem to be that if the contract is British, it may be upheld (*Compania* v. *Brauer*, 168 U. S., 104, 118; *Pritchard* v. *Norton*, 106 U. S., 124, 136-7; *Cromwell* v. *Co. of Sac*, 96 U. S., 51, 62; *Cox* v. *U. S.*, 6 Pet., 203).

If considerations of public policy can ever justify our courts in refusing to interpret a contract in accordance with the law with reference to which the parties have contracted, the circumstances ought to show conclusively, in every such case, that the judicial sanction of the agreement would work an injury to our public or commercial interests. It must be admitted that some of the cases in the District Courts, previously referred to, hold that our interests are injured in cases where the contract, exempting from negligence, is made here, or is to be wholly or in part performed here, and the negligent act occurs within our jurisdiction. It is not conceded that the principle should go to this length, where the stipulation providing for the foreign law is explicit (The *Oranmore, post*, App. B., pp. 54, 55). But even if it does, the present case would not fall within it, for here the negligent act occurred beyond our jurisdiction. The case is no different in principle than it would have been if the vessel had been bound to an English port and the action had been brought here. Actions are not infrequently brought in our courts where this country is neither the beginning nor the end of the voyage (*e. g.*, *O'Brien* v. *Miller*, 168 U. S., 287). If, in the present case, the destination had been England and the libels had been filed here, there can hardly be a doubt that our courts would have adjudicated the rights of the parties in accordance with the English law. Our public policy would not have been involved. The contract was made and the negligent act committed beyond our jurisdiction. There could

be no question of negligence in delivery, because the only fault complained of occurred in the early stage of the voyage. No reason would have existed for declining to apply the English law. Why should a different rule apply in the cases as they stand? Our public policy is no more involved by reason of the accident that the cargo was destined to this country than it would have been had the goods been bound to another. It is plain that in one case the foreign law would apply, and the reason of the matter appears to be that it should apply equally in the other.

(e.) The English cases on the question whether a foreign contract, contrary to public policy can be enforced in England have arisen where the breach involved arose in the performance of some part of the agreement within England.

The case of *Hope* v. *Hope*, 8 De Gex, M. & G., 731, arose under a contract executed in France between an English husband and a French wife, to be performed partly in France and partly in England. Certain of its provisions were repugnant to the public policy of England, but were alleged to be valid under the law of France. The suit was in respect of the performance of that part of the contract which was to take place *in England*, and hence the contract was not upheld. Lord Justice Knight Bruce (p. 740) said:

"But ought the document to be deemed, not merely in language, but also in substance, a French contract, and thus to be construed and have effect upon the principles and according to the rules of the French law, and consequently valid or invalid as they dictate, if at least it contains not any material provision tending directly *to infringe within England* the policy of the English law? And, secondly, does the bill state with sufficient fullness or distinctness what the rules or principles of the French law are so far as the suit or its subject is concerned? And, thirdly, does the document contain any material provision tending di-

rectly *to infringe within England* the policy of the English law? In my opinion not one of these three questions can be answered favorably for the plaintiff."

The remarks of Lord Justice Turner in the same case (p. 743), though general, are to be read in the light of the fact that the infringement of the British policy occurred in England, in connection with a part of the contract to be executed there.

In *Rousillon* v. *Rousillon*, 14 Ch. Div., 351, an injunction was sought to restrain the defendant from carrying on business as a wine merchant in England; to enforce payment of a judgment against him given in his absence by a French court; and to recover damages for a breach of defendant's agreement subsequent to the date of the French judgment. The contract between the parties restrained the plaintiff from engaging in business as a wine merchant for the period of ten years. The defendant resided in England at the time the contract was signed by him during a temporary sojourn abroad, and the breach complained of was committed within England. It was held that the foreign judgment could not be enforced, because the French court had no jurisdiction over the defendant when the judgment was rendered; that the contract in restraint of trade was not unreasonable, and could be enforced in England. The remarks of Lord Justice Fry (p. 369) are *obiter* merely, as he issued the injunction prayed for, and awarded nominal damages for the breach of contract.

The *dicta* in *Hamlyn* v. *Talisker* (1894), A. C., 202, cited by this Court in 168 U. S., at p. 118, fall within the principle applicable where the breach occurs in the country in which the suit is brought. The contract in that case was signed in England, but the business under it was to be conducted in Scotland, and the breach occurred in Scotland. Two of the judges intimated (pp. 209, 214) that the Scotch court would not be bound to

uphold a provision of the contract if contrary to the public policy of Scotland and Lord Watson intimated the contrary (p. 213), but the point was not decided, as the Court found that it was not contrary to such policy. What was said, however, related to a breach *in Scotland*, in the performance of that part of the contract which was to be executed there.

In *Printing and Numerical Registering Company* v. *Sampson*, L. R., 19 Eq., 462, at 465, Jessel, M. R., declared what we submit is the true doctrine, as follows:

"It must not be forgotten that you are not to extend arbitrarily these rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."

In *Underwood* v. *Barker* (1899), 1 Ch., 300, 305, Lindley, M. R., dealt with the same subject as follows:

"If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country. Of course, I am not speaking of contracts induced by fraud, duress or undue influence, or impeachable on any other recognized ground of invalidity. Omitting all such cases, the public policy which allows a person who obtains employment, on certain terms understood and agreed to by him, to repudiate his contract conflicts with and must to avail the defendant prevail for some sufficient reason over the manifest public policy which, as a rule, holds him to his bargain."

Nothing said in any English case is really authority for the proposition that the public policy of

the *lex fori* is infringed by upholding a good foreign contract expressly made with reference to the foreign law, where the breach complained of occurs *beyond* the jurisdiction of the country of the forum; nor is there anything in the English law which intimates that in such a case the foreign law should not be applied.

(f.) Our State Court cases hold that the law with respect to which the parties have expressly or presumptively contracted, applies in the construction of international or interstate contracts, even though opposed to the public policy of the forum and invalid if made there.

In *Fonseca* v. *Cunard Steamship Co.*, 153 Mass., 553, the plaintiff took passage on the defendant's steamer from Liverpool to Boston. He had with him, on the ship, his trunk, containing articles of clothing and personal property reasonable and proper for an ocean traveler to carry as personal baggage, "all of which were entirely ruined *on the voyage* by the negligence of defendant." The passenger's ticket contained an exemption from loss of or injury to the passenger or his baggage, "whether arising from the act of God," &c. * * * "or negligence of the company's servants." The exemption from damage by the negligence of the company's servants would have been invalid if made in the State of Massachusetts, because contrary to its public policy. The Court, nevertheless, held that being valid by the law of England, where made, it should be upheld when the defendant was sued in the State of Massachusetts.

Knowlton, J., delivering the opinion of the Court, at page 557, said:

"The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a

similar contract made in Massachusetts would be held void as against public policy (*Greenwood* v. *Curtis*, 6 Mass., 358; *Forepaugh* v. *Delaware, Lackawanna & Western Railroad*, 128 Penn. St., 217, and cases cited; *In re Missouri Steamship Co.*, 42 Ch. D., 321, 326, 327; *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S., 397").

In *Forepaugh* v. *Dela , Lacka. & Western Ry. Co.*, 128 Penn. St. Rep., 217, the controversy arose under a contract made in New York for the carriage of freight from Binghamton to Cortland, in the same State. It contained a negligence exemption, and the Court found that, during the journey, the train parted through the negligence of an engineer, causing damage to the plaintiff's property. The place of the contract, the place of its performance and the scene of the accident were all in New York State. By the law of New York, negligence exemptions in the contracts of common carriers are valid, but by the law of Pennsylvania they are invalid. The Court below, applying the law of New York, upheld the negligence exemption and entered judgment for the defendant; and this judgment was affirmed on appeal. *Mitchell, J.*, in delivering the opinion of the Court (at p. 231) said:

"Holding, therefore, that the validity of this contract is to be determined by the law of New York, as decided by the Courts of that State, is there any reason why the Courts of this State should not enforce it? The general rule is, that Courts will enforce contracts valid by the law of the place where made, unless they are injurious to the interests of the State or of its citizens (*Story on Conflict of Laws*, Sections 38, 244). The injury may be indirect by offending against justice, or morality, or by tending to subvert settled public policy (2 *Kent*, 458; *Greenwood* v. *Curtis*, 6 Mass., 358; *Bliss* v. *Brainard*, 41 N. H., 256. But this does not imply that courts will not sustain contracts that would not be valid if made within their jurisdiction, or will not enforce rights that could not be acquired there. Thus, for example, the Courts of Pennsylvania have always enforced contracts for a higher rate of inter-

est than would be valid under the laws of this State (*Ralph* v. *Brown*, 3 W. & S., 395; *Wood* v. *Kelso*, 27 Pa., 243; *Irvine* v. *Barrett*, 2 Gr., 73).

"The contract in the present case does not directly affect the State or its citizens in any way. Nor is it in any way contrary to justice or morality. It may be doubted whether it is even so far contrary to the policy of the State that it would have been invalid if it had been made here. It has some exceptional features, which, it is argued, take it out of the ordinary rules governing the contracts of common carriers, and the case of *Coup* v. *Railroad Co.*, 56 Mich., 111, is a strong authority for that position. But, without stopping to discuss that point, which our general view renders unnecessary, it is sufficient to say that *even if it would not have been valid if made here, its enforcement as a New York contract does not in any way derogate from the laws of Pennsylvania, or injure or affect the policy of the State*, any more than would a foreign contract for what would be usurious interest here, and that, as already said, the courts have never hesitated to enforce."

In *Dugan* v. *Lewis*, 79 Tex., 256, a citizen of Texas negotiated a loan through bankers in New York, but the notes for the loan and the expenses, and the deed of trust upon lands in Texas to secure the loan, were executed in Texas and transmitted to New York, where the loan was perfected by the delivery of the borrowed money. The notes bore 10 per cent. interest, a rate permissible under the law of Texas, but usurious under the law of New York. A clause in the deed of trust provided that "the contract embodied in this conveyance, and the notes secured thereby, shall, in all other respects, *be construed by the laws of the State of Texas.*" This suit was brought against the payee and transferee of the notes, to restrain the enforcement of the deed of trust, on the ground that the contracts were governed by the laws of the State of New York, and were, therefore, usurious and void. It was held that, under the clause providing that they should be governed by the law of Texas, the suit was not maintainable.

This Court also has held that "when the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern" (*Cromwell* v. *County of Sac*, 96 U. S., 51, 62; citing *Miller* v. *Tiffany*, 1 Wall., 298; *Depau* v. *Umfries*, 8 Mart., N. S., 1; *Chapman* v. *Robertson*, 6 Paige, 627, 634; *Peck* v. *Mayo*, 14 Vt., 33; *Butters* v. *Olds*, 11 Ia., 1).

A similar rule has been held in Rhode Island, with reference to Sunday contracts (*Brown* v. *Browning*, 15 R. I., 422). And in *Commonwealth of Kentucky* v. *Bassford*, 6 Hill, 438, it was held that a contract made and to be performed beyond the State of New York in relation to a foreign lottery, if lawful where made, would be enforced in New York, though if made in New York it would be unlawful (see also *Thatcher* v. *Morris*, 11 New York, 438).

III.

The first and second sections of the Harter Act do not exclude the foreign law contracted for by the parties.

In the District Court it was held that these sections apply to contracts made abroad and invalidate the exceptions in the bill of lading opposed to them (p. 48), but in the Court of Appeals a majority held the public policy of our commerce forbade the enforcement of the contracts, finding it "unnecessary to decide whether the prohibitions of the Harter act apply to a bill of lading issued at a foreign port" (p. 54); while Judge Lacombe, concurring only in the result (p. 56), left it to be implied that he disagreed both with the District Judge and his own brethren on the point of law.

The same court previously declined to express an opinion on this point (The *Etona*, 38 U. S. App., 60).

(a.) The first and second sections of the act prohibiting the insertion in bills of lading of clauses relieving a shipowner from negligence in loading or stowage (*post*, pp. 49-50) do not seem to be designed to apply to contracts made abroad.

The original intention of the statute seems to have been to have it apply only to contracts of vessels trading between ports of the United States or to contracts made here for foreign voyages. This is indicated by form of the phrase which originally appeared in the first, second, third and fourth sections, making them applicable to "any vessel transporting merchandise or property from or between ports of the United States and foreign ports" (*post*, pp. 49-51), and by the subsequent change in the third section to make that one applicable to "any vessel transporting merchandise or property *to or from* any ports in the United States" (*post*, p. 50). If the original phrase was understood to cover vessels bound from abroad to ports in the United States, the amendment of the third section during the passage of the act was unnecessary. The fact that it was made indicates an intention to give the third section an application which it, in common with the other three, would not otherwise have had, namely, to vessels coming to our ports from abroad. The first and section sections having been left in final form as they originally stood, should be deemed to have a narrower application, and to apply only to contracts made within our jurisdiction.

This argument is reinforced by construction of the first and second sections with the fourth and fifth. The fourth section makes it the duty of the "master or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports" to issue a bill of lading to the shippers, stating marks, number of packages, &c., and the apparent order or condition

of such merchandise, which it is further provided shall be taken as *prima facie* evidence of the receipt of the merchandise therein described. It is not to be presumed that Congress intended this section to prescribe the duties of the owners, master or agents of vessels loading abroad, or that the provision stating the evidential value of such a document—a matter peculiarly within the law of the foreign forum—should be deemed to apply to foreign contracts. Section 5 provides that "for a violation of any of the provisions of this Act, the agent, owner or master of a vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for shall be liable to a fine not exceeding $2,000. The amount of the fine and costs for such violation shall be a lien upon the vessel whose agent, owner or master is guilty of such violation, and such vessel may be libeled therefor in any District Court of the United States within whose jurisdiction the vessel may be found. One half of such penalty shall go to the party injured by such violation, and the remainder to the Government of the United States."

The refusal to give a bill of lading in the form prescribed by Section 4, and without any of the clauses denounced by Section 1, would plainly be a violation of the act to which the punishments prescribed by Section 5 would apply. It could hardly be claimed, however, that it would be competent for the Congress to prescribe these penalties or for the Court to enforce them in cases of contracts made or violations of the statute committed in Buenos Ayres. The fact that the fourth section prescribing the form of the bill of lading applies in terms, like the first and second sections, to "any vessels transporting merchandise or property from or between ports of the United States and foreign ports," but obviously would not and could not be enforcible as respects contracts made in Buenos Ayres, would seem to indicate that the first and second sections, which cover the like classes of voyages, were also not intended to apply to such cases.

(b.) But all doubt as to the applicability of the Harter Act was removed by an explicit provision in the bill of lading that it should be controlled by the law of the flag. It was competent for either party to contract himself out of the benefits of the statute.

The third section provides that the ship owner shall not "*be held*" responsible for certain causes of damages there enumerated, provided he has used due diligence to make the ship seaworthy. Yet the courts have held, nevertheless, that he may contract himself out of the benefits of that section, and "be held" to greater liabilities (The *Silvia*, 68 Fed., 230, 233; *Hine* v. *New York & Bermudez Co.*, 73 Fed., 852, 853-5). If the shipowner can contract himself out of the benefits of the third section, the reciprocal rule that the shipper may also contract himself out of the benefits of the first or second section should also apply. So far as the statute bears on the duty of a Court, the third section is quite as strong as the first. The provision that the ship shall not "be held," is as direct and positive as the provision of the first section that the prohibited clauses "shall be null and void." If either party can contract himself out of the statute, both should be permitted to do so.

It has been held in England, under the Employers' Liability Act of 1880, that an express contract by which a workman engaged to forego the benefits of the act in the event of injury, was valid (*Griffiths* v. *Earl of Dudley*, 9 Q. B. D., 357).

The right to contract one's self out of a liability or penalty imposed by statute, appears to be well settled. It has been asserted in this country, and in this Court, in cases arising under statutes against usury (*ante*, pp. 30, 31). The maxim of law is "*Quivis renunciare potest juri pro se introducto*" (*Bovill* v. *Wood*, 2 M. & S., 23, per Bayley, *J.*, at p. 25); or, as it appears in Cod., 2, 3, 29, "*Omnes licentiam habere, his quæ pro se introducta sunt renuntiare.*" Cf. *Wilson* v.

Macintosh (1894), App. Cas., 129, at 133. In *Rowbotham* v. *Wilson*, 8 E. & B., 123, at 151, Martin, *B.*, says: "I cannot perceive any reason, either at law or otherwise, why parties should not be at liberty, by apt words, either to add to, or qualify, or make more or less extensive, the right which the law of itself provides and imposes, or, if they think fit, declare that such rights shall not exist at all. *Quilibet potest renunciare juri pro se introducto.*" Again, Erle, *C. J.*, in *Rumsey* v. *North-Eastern Ry.*, 14 (C. B. (N. S.) 641, at 649, says: "It is undoubtedly competent to any man to renounce a privilege which is given to him by a statute."

(**c**.) The Court will not refuse to sanction such a contract, merely because it may be opposed to public policy, if it be otherwise valid.

In *Printing and Numerical Registering Co.* v. *Sampson*, L. R., 19 Eq., 462, at 465, Jessell, *M. R.*, says: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." This passage was subsequently approved by Chitty, *J.*, in *Tullis* v. *Jacson* (1892), 3 Ch., 441, 445. See also per Jessell, *M. R.*, in *Wallis* v. *Smith*, 21 Ch. Div., 243, 266; *Underwood* v. *Barker* (1899), 1 Ch., 300, 305, quoted *ante*, p. 27; *Holmes on the Common Law*, 205. "It is clear," said Lord Campbell in a case of restraint of trade, "there would be evil if the law justified such a breach of contract; but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation of his promise to the plaintiff" (*Tallis* v. *Tallis*, 1 E. & B., 391, 413). As to the argument of public policy, Burrough,

J., says, in *Richardson* v. *Mellish*, 2 Bing., 229, 252: "I, for one, protest, as my Lord has done, against arguing too strongly upon 'public policy'; it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

IV.

If the Harter Act applies to the case, the damage resulted from "faults or errors in navigation or in the management of said vessel" and was within the protection of its 3d section.

The District Judge was of opinion that the 3d section of the statute does not extend to a case like the present, "though" he adds, "the question has caused me no little embarrassment" (p. 46). The majority in the Court of Appeals concurred in this conclusion, without further discussion than to say the damage was due to "negligence in the loading or stowage of the cargo" (p. 54).

Both of the Courts below failed, as we contend, to attach the proper weight to certain undisputed and stipulated facts. Both necessarily found (for it was so stipulated) that "there was no damage to the wool from sugar drainage until the ship was trimmed by the head at Para" (p. 28, date March 10, p. 29); that "it was damaged by sugar drainage finding its way through the bulkhead and reaching the wool at Para or between Para and Port of Spain" (p. 28, dates March 10-16, p. 29); "that after the ship was again trimmed by the stern at Port of Spain none of the drainage from the sugar found its way into the forward 'tween-decks" (p. 28, dates March 18-31, p. 29), and that "the Court may draw inferences" (p. 28). The wool had been stowed in Buenos Ayres on

or before the preceding December 25th (p. 29), and the sugar in Pernambuco February 19th-24th (p. 29). Both, therefore, had been in the ship in the same places and in the same condition of stowage for about a fortnight without injury; and, concededly, they made the voyages from Pernambuco to Para, and from Port of Spain to New York, in safety. The undisputed evidence of good stowage and proper dunnage (*ante*, pp. 3, 4) is thus confirmed by the event. The stowage of itself was not only not negligent, but was admittedly sufficient to prevent damage; and the sole inference as to the cause of the damage is the improper trim of the ship by the head from Para to Port of Spain (p. 47). The failure to keep the ship trimmed by the stern so the drainage should flow "aft as designed" (p. 46), to the scuppers there located, would seem, under the circumstances, to be a "fault in navigation or in the management of the vessel" rather than "neglect in loading or stowage," and to have been the proximate cause of the damage.

(**a**.) There was no negligence in the manner of stowing the wool at Buenos Ayres, or in stowing the sugar at Pernambuco, considered either separately or with reference to each other.

So long as the vessel retained her proper trim, no damage could occur, and the master might reasonably have expected her to retain it throughout the voyage. There is no intimation in the evidence or in the opinions below, that when the sugar was stowed at Pernambuco there was ground to expect the ship would lose her trim, in subsequent discharging, or at any other time; nor that, if a change of trim was threatened, there would not be abundant opportunity to prevent it. There was, therefore, no negligence of any kind until, at Para, the ship was permitted to become and to remain by the head. Before that time the stowage of the sugar and wool had been completed. Therefore, there was no fault in the original stowage of the cargo.

Nor was there fault in the discharge of cargo at Para. It was necessary, and was, of course, expected, that the cargo consigned to Para should be taken out at that port, and it was taken out, for all that appears, in a proper manner as far as concerns the discharge itself. The change of trim was not a necessary consequence of the discharge, for it could obviously have been avoided by changes in water or other ballast or by shifting cargo. It was the master's duty, as the trial Judge expressed it, to take care "subsequently that no changes of loading should bring the ship down by the head" (p. 47). He failed in that duty, with the result that the ship was put into a condition dangerous to the cargo she had on board.

(b.) The failure properly to regulate the trim was not a fault in stowage.

The learned District Judge was of opinion that since the manner in which the vessel was originally stowed, furnished the reason why she ought not to be allowed to get by the head, the maintenance of her trim in a subsequent *discharge of cargo* (which he called a change in loading) became a part of the loading and stowage, and that a subsequent faulty trim related back and partook of the nature of a fault in stowage. He said that "the wool should not have been stowed forward of the wet sugar, unless care was taken in the other loading, and in all subsequent changes in the loading to see that the ship should not get down by the head" (p. 46) and that "the negligence consisted *in stowing the wool far forward*, without taking care *subsequently* that no changes of loading should bring the ship down by the head" (pp. 46-7).

It can hardly be, however, that that which was not want of prudence in stowage at the time of loading the wool, could become such afterward by virtue of later occurrences.

On the other hand, if the real negligence oc-

curred at a subsequent period of the voyage, such negligence cannot be transformed into a lack of care in stowage upon the theory that it was the manner of stowage which made necessary the subsequent preservation of trim. The law distinguishes only between stowage which is proper and stowage which is not proper. If the cargo was originally stowed in a proper manner, so that there was no reasonable ground to apprehend damage, it can make no difference whether it was stowed in one way or in another. The subsequent damage from a cause other than stowage, has no legal relation to the method of stowage adopted. The stowage was all right so long as the ship was kept in the right trim, *i. e.*, properly managed as the carrying vehicle. The case would be the same as if the wool were stowed in a compartment by itself, and could not be damaged unless the ship heeled over far enough to bring water or cargo drainage (The *Etona*, 64 Fed., 880, 38 U. S., App. 50), down her hatches. If such a vessel were permitted to capsize while discharging by taking out all the cargo on one side first, it would seem that the Court must say, if the principle applied below be correct, that the stowage was negligent, and that the negligence consisted in stowing the wool in the most suitable place in the vessel without taking care subsequently that the ship should not tip over.

Indeed, if wool in a forward hold were injured by collision, due to a wrong order given to the helm, would not the same argument prove that to be a fault "in stowing the wool far forward without taking care subsequently" that collision should not occur? The question in both cases must be whether the injury should reasonably have been anticipated from the stowage; if not, the fault is not in stowage, but in a subsequent and different kind of lack of care.

(c.) A negligent alteration of trim is a fault of management within the Harter Act.

It has been argued that the clause of the Harter Act exempting the shipowner for faults in management must receive a restricted construction, so as not to conflict with the more particular provisions of those clauses which forbid the insertion of agreements in bills of lading, purporting to relieve shipowners from liability for faults in stowage and delivery. It is conceived, however, that if there is any conflict, the exemption of faults in management, which is explicit, must prevail over the other clauses which bear on the shipowner's liability only by inference. They do not say what his liability is; they only declare that such liability as he has, he shall not diminish. The third section fixes the liability and is dominant. It declares that where the shipowner, having taken all care to provide a proper ship and a proper crew, is not personally at fault, he shall not be made responsible for the dereliction in duty of those to whom he has necessarily and properly committed the management and navigation of his vessel. Unless such damage can be fastened on the person whose act has caused it, it must lie where it falls. The other causes do not cut this provision down. They may give rise to an inference that stowage and loading not affecting the fitness of the ship to carry the cargo are not included within the management of the ship; but nothing more.

For loss arising from mere accident, the act allows the shipowner to relieve himself by agreement as he sees fit. For loss arising from negligence of his agents, the act fixes his liability. It is believed to have been the intent of Congress to absolve the shipowner from liability for failure of his officers or crew in everything connected with seamanship and in the acts customarily performed and things determined by the officers and crew; that is to say, for failure to do properly whatever would fall within the scope of their duties in the course of an ordinary voyage, from the time the cargo comes on board until ready for delivery at its

port of destination. This would include the regulation of the trim of the vessel, so far as that affected her fitness to carry the cargo, as well as the use of any of her appliances in the ordinary course of the voyage. In the short definition of "management" given by the Court in the *Silvia*, 171 U. S., 462, 466, this much seems to be determined. Mr. Justice Gray there said:

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel within the meaning of the act of Congress. *They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo.* But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words (*Good* v. *London Steamship Owners' Association*, L. R., 6 C. P., 563; *The Warkworth*, 9 Prob. Div., 20, 145; *Carmichael* v. *Liverpool Shipowners' Association*, 19 Q. B. D., 242; *Canada Shipping Co.* v. *British Shipowners' Association*, 23 Q. B. D., 342; *The Ferro* (1893), Prob. 38; *The Glenochil* (1896), Prob. 10)."

For similar definitions in the lower courts see *The Sandfield* (79 Fed., 371; 61 U. S., App., 385); *The Mexican Prince* (82 Fed., 484; affirmed by the Circuit Court of Appeals, Second Circuit, on the opinion of the District Court, January 26, 1899); *The British King* (89 Fed., 872, 874).

In *Lawrence* v. *Minturn*, 17 How., 100, Mr. Justice CURTIS said:

"As the quantity of lading and the consequent *trim* and seaworthiness of a vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is intrusted for the benefit of all concerned with a supervision, his failure to do so properly is negligence for which the owner may be liable."

For that reason it was considered that under an allegation of carelessness of the master a cargo owner might show overloading of the vessel. In the *Argo*, Swabey, 462, 464, Dr. Lushington stated that the trim of the ship was within the province of the master. The trim determines the fitness of the ship, not only for the proper drainage of all leakages aft (vessels being built, universally, so that everything shall flow aft (p. 20) to pumps and wells), but also for purposes of navigation, it being recognized that vessels neither steer nor steam so well, when down by the head. Seeing that the ship has the right trim for either or both purposes seems therefore to belong primarily to the management of the ship, although in a secondary sense it may relate to or affect the cargo.

In the *Rotherfield*, 8 R. I. D. M., pp. 102, 104, the Marseilles Tribunal of Commerce, in construing an exception in an English bill of lading which exonerated a shipowner from responsibility for the faults of pilots, officers and crew in the "management or navigation of the ship," defined the word "management" as follows:

"The expression 'management' used by the parties should be interpreted in the sense which is especially attached to it in the language used by the parties in their contract. The tribunal has already had occasion to define the meaning of that expression. In the English language it has not the signification and the general scope which are attributed to it by the defendants. It refers only to the purely technical acts which the master has to perform, in that capacity, for the nautical direction to the ship, for all the manœuvring operations appertaining to her management (conduite) at sea, *in port*, or at anchorage, *to the proper stowage of the merchandise for the stability of the ship, and to the ballasting*, in a word, to all that concerns nautical art that is to say, to the navigation, properly so-called, and to keeping the ship afloat (la bonne tenue à flot du naivre)."

In the *British King* (*supra*), damage to cargo caused by the failure to take soundings to ascertain the extent of a known leak and to make use of the pumps to keep the water that leaked in away from the cargo, was held to be due to a fault in management. In the *Sandfield* (*supra*), damage resulting from the failure to open the sluce drains in heavy weather, and thus free the bilges from leakage, which, owing to such failure, overflowed the cargo floor and damaged the cargo, was also held to be due to fault in management.

In the *Etona* (64 Fed., 880; 38 U. S. App., 50), the ship was exonerated from liability for damage by sugar drainage to another part of the cargo, owing to the ship taking a list in consequence of a fault in navigation or in the management of the ship. In that case, wet sugar was stowed in the between-decks, and dry hides in the lower hold. The between-deck hatchway leading into the lower hold was protected by a coaming about a foot in height. The vessel was improperly anchored at Para, in consequence of which the current in the Amazon caused her to drag her anchor, to take the ground, and list over to such an extent that the drainage in the between-deck overflowed the coaming and damaged the hides underneath. The stowage of the sugar in the between-deck was proved to be proper, and the loss was ascribed to faults in navigation or management, upon a finding that at the time the cargo was stowed there was no reason to apprehend that the vessel would take such a list as would permit the drainage to overflow the coaming.

The principle there applied fits the present case. At the time the wool and the sugar were stowed, there was no reason to apprehend that the vessel would get down by the head, so that the drainage would flow forward instead of aft. The Court has found that the sugar was stowed with the design that the drainage should flow aft and down the scuppers, located at the back end of the between-deck. The negligence in allowing the ship to get

down by the head so that the drainage flowed forward in a direction not designed and not anticipated at the time of the stowage, was as much a fault in management as the negligence in the case of the *Etona*, which resulted in the drainage flowing sidewise and over the coaming, and causing the same kind of damage.

In *The Glenochil* [1896], Prob., 10, it became necessary during the discharge of cargo at the port of destination to stiffen the ship, and for this purpose water was run into a ballast-tank, and because of the damaged condition of a sounding pipe and its casing due to heavy weather on the voyage, that part of defendant's cargo still in the hold was damaged. The omission to ascertain the condition of the sounding pipe was negligence. The bills of lading incorporated, by reference, the provisions of the Harter Act. It was *held* that the word "management" extended to operations, during discharge at the port of destination as well as at sea; that the stiffening of the ship by means of the ballast tank was an act of management; and that the failure to ascertain the condition of the sounding pipe was a fault in management for which the ship was not liable.

In *The Ferro* [1893], Prob., 38, where a bill of lading contained an exemption for loss from any act, neglect or default "in the management or navigation of the ship," and it was held that stowage without sufficient dunnage was not within the exemption, Sir Francis Jeune said at page 45:

> "It is not difficult to understand why the word 'management' was introduced, because inasmuch as navigation is defined as something affecting the safe sailing of the ship in the case I have referred to, it is easy to see that there might be things which it would be important to guard against connected with the ship itself, and the safe management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation for example might be management of the ship, but would have nothing to do with the navigation."

In *The Glenochil* (*supra*, at p. 16) the same learned Judge said:

"It may be that the illustration I gave in that case (*The Ferro*) as to the removal of the hatches for the sake of ventilation was not a very happy one, but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo, and want of care of vessel, *indirectly affecting the cargo.*"

In *Dobell & Co.* v. *S. S. Rossmore Co.* (1895), 2 Q. B., 408, A. L. Smith, L. J., said, at page 47:

"It is not necessary to decide what is the interpretation of the expression 'faults or errors in navigation or in the management of the vessel.' I may say, however, that I think that the meaning of the section is that if the shipowner by himself or his agents uses due diligence to make the ship seaworthy, when she starts, he shall not be liable for what happens afterwards when the ship is at sea, and he has no more control over her."

It seems clear that there may be acts constituting management of the vessel in port as well as at sea, as was decided in the case of *The Glenochil* (*sup.*), and that for such acts of management as are under the control and form a part of the duty of the officers of the vessel it is the intention of Congress that the owner shall not be liable. The preservation of a vessel's trim is a part of the duty of her master in respect to his care and oversight of the vessel, and constitutes a part of her management.

If the change of trim had been designedly produced by filling ballast tanks, to steady the ship, the appellant would not have been liable, under the rule laid down in the *Glenochil* (*supra*) for resulting damage to the wool. If so, a negligent omission to steady the ship by means of the ballast tanks, or otherwise, would equally have been a fault of management; and a failure to trim her properly, so long as it was the *trim of the ship*, and not of the cargo that was involved, would stand on the same ground.

(**d.**) Whether an act or omission constitutes a fault in management depends on the nature of the thing done or omitted, and not on the purpose of the man who does it, or the means he takes to accomplish it.

The District Judge distinguished the case of *The Glenochil* (*sup.*) upon the grounds (1) that the act done was primarily for the benefit of the ship and not of the cargo; and (2) that it was done with ship's appliances (p. 47). It would seem, however, that that case should not have been differently decided if the purpose of filling the tank had been to benefit the cargo by bringing the ship down nearer to the wharf, so as to facilitate the discharge, as in *The Glenmavis*, 69 Fed. Rep., 472. In either case, the primary effect of the act would be upon the ship, and it would affect cargo only through affecting the ship. If a change in the ship designed for the ship's benefit is management of the ship, it must equally be management, though designed for the benefit of the cargo.

It is difficult to see what object the framers of the Harter Act could have had in providing that the owner of a vessel should be liable for the negligent manner in which a master filled a ballast-tank, provided he intended to benefit the cargo by it, and not liable, if he did it intending to benefit the vessel; or what the rule of liability should be if it were intended both to stiffen the vessel and to bring her down in the water, so that cargo could be delivered to the wharf from a lesser elevation.

The whole voyage and everything done in the prosecution of it is for the benefit of the cargo as much as of the ship. As Sir Francis Jeune said in *The Glenochil* (*supra*, at p. 15), "In a secondary though not in a primary sense, any mismanagement of the ship, in navigation or otherwise, is a want of proper care as regards the cargo."

If an alteration of the vessel's trim by means of ballast tanks is an act of management, an alteration

effected by any other means, or without the use of the ship's appliances, as by shifting cargo, is an act of management of the vessel, because it relates primarily to the vessel. And a negligent omission to correct an improper trim, is a fault of management equally whether the trim should have been corrected by using ballast tanks or by shifting cargo, or by any other method whatever.

(**e**.) The proximate cause of the damage was the improper trim of the vessel.

If the foregoing remarks are well-founded, it is immaterial that the reason why the vessel should not have been permitted to get out of trim was the likelihood of damage to cargo, or that her improper trim was not the result of a misuse of ship's appliances. An improper trim for the cargo as stowed being a fault of management of the ship, the question is, whether such fault caused the damage, or whether it should be attributed to some other cause.

Here again, for illustration, recourse may be had to the extreme case supposed above of a vessel so lightened by the discharge of cargo at one side as to admit water at the other. It is the improper trim which directly produces the damage. It may be true that the consequences of the faulty trim might have been avoided by a restowage of cargo, but so in *The Silvia* (*supra*), the consequences of leaving the port open might have been avoided by taking cargo from the compartment. Even if it had appeared in that case that spreading a tarpaulin over the cargo would have kept it dry, it is believed that the negligence would still have been considered to lie in the omission to close the port, and it would have been held: *first*, that that omission was negligent, because damage to cargo, though not to ship, was likely to result; *secondly*, that in a legal sense the negligence consisted in that omission alone, since the necessity for

spreading the tarpaulin arose only in consequence of it, and lasted only while the omission to close the port continued. So, in the case at bar, the omission to preserve the ship's trim by the stern was improper, because of the likelihood of damage to cargo; and even if such damage might have been avoided by shifting and restowing the wool before the sugar drainage reached it, the damage to the wool is not to be attributed to a failure to protect the wool against the sugar drainage, but solely to the improper trim of the ship by which the injury was directly produced.

Last Point.

The decrees of the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York should be reversed, and the causes remanded to said District Court, with instructions to dismiss the libels, with costs.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Respondent-Appellant.

J. PARKER KIRLIN,
Advocate.

Dated New York, April 6, 1899.

APPENDIX A.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill.)

HOUSE BILL 9176.

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or*

[PUBLIC—No. 57.]

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lad-

damage therefrom, and any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2 That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessels *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America *and foreign ports* shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, ing or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence*, properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the manage-

if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery, nor shall the owner or owners, *the vessel,* or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

ment of said vessel nor shall the *vessel,* her owner or owners, charterers, *agent,* or master be held liable for losses arising from dangers of the sea *or other navigable waters,* acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued, until they are modified to conform to the requirements of said sections.*

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282 and 4283 of the Revised Statute of the United States.

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States within whose jurisdiction the vessel may be found. One half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.*

SEC. 6. That this act sha
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States, *or any other statu
defining the liability of ve
sels, their owners, or repr
sentatives.*

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

[Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147–149, 169.]

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July*, eighteen hundred and *ninety-three.*

[Passed the Senate as amended February, 1893. 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342. Approved, February 13, 1893. 27 Stat., 445.]

Appendix B.

JUDGE BOND'S DECISION IN THE ORANMORE, AFFIRMING 24 FED. REP. 922.

EDWARD MORRIS, by Augusta Rieser, His next Friend, vs. Steamer ORANMORE.	In the Circuit Court of the United States for the District of Maryland in the Fourth Circuit. In Admiralty.

This cause having been heard and considered, the Court on this 15th day of December, 1885, finds the following facts and conclusions of law.

FINDINGS OF FACT.

1. Edward Morris, of Chicago, the libelant below, under and in pursuance of the live stock freight contract and the bill of lading, Exhibits A and B, filed with the libel in this case, shipped alive and in apparently good condition, 320 head of cattle to be delivered at Liverpool or Birkenhead, England, as provided by said contract and bill of lading.

2. By the said contract and bill of lading the shipper was to provide sufficient attendants, ropes. bedding, food and necessaries for the care and use of the cattle, and the steamer was to provide stalls or pens for the cattle. The steamer provided stalls or pens for the cattle and fittings as required by the contract and bill of lading. The shipper did not provide a sufficient number of men for the care of the cattle, nor a sufficient quantity of bedding, nor sufficient or proper ropes for the safe transportation of the cattle.

3. By the negligence and inefficiency of the foreman of the cattlemen and his assistants, and by the want of proper and sufficient bedding and ropes sixty-seven of said cattle died in the course of the voyage to Liverpool.

4. The cattle fittings on the *Oranmore* on the said voyage were properly constructed in accordance with the provisions of the contract and bill of lading and were approved and passed as good and sufficient by the inspector of underwriters interested in the ship and all the cargo except Morris' cattle. Morris did not insure his cattle for said voyage and Morris accepted the fittings then on the steamer.

5. The 16th article of the live stock freight contract contained the provision that any questions arising under that contract or the bill of lading against the steamer or her owners were to be determined by English law in England.

6. By the English law all the provisions of the live stock freight contract and the bill of lading were lawful and valid.

CONCLUSIONS OF LAW.

1. The loss having been caused by the default of the libelant and his agents the libel must be dismissed, with costs.

2. The English law governs the case.

3. Under the provisions of the live stock freight contract and the bill of lading, the steamer and her owners are free from liability for the losses sustained by the libelant and the libel must be dismissed, with costs.

HUGH L. BOND,
Ct. Judge.

UNITED STATES OF AMERICA, } to wit:
District of Maryland, }

I, JAMES W. CHEW, Clerk of the Circuit Court of the United States for the District of Maryland, do certify that the foregoing is a true copy of the findings of fact and conclusions of law filed in the above entitled case of Edward Morris, &c., vs. steamer *Oranmore*, in said Circuit Court, on the 15th day of December, 1885.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said Circuit Court this sixteenth day of March, A. D. 1899.

[SEAL.]

JAS. W. CHEW,
Clerk.

No. 507. No. 84. 82

Brief of Myndersa for Re

Filed Nov. 15, 1894.

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NO
JAMES H

Supreme Court of the United States.

BOTANY WORSTED MILLS,
Libellant,

Against

JAMES KNOTT,
Respondent and Petitioner.

HENRY P. WINTER AND CHARLES F. SMILLEY,
Libellants,

Against

JAMES KNOTT,
Respondent and Petitioner.

507

Brief for Libellants in opposition to Petition for Writ of Certiorari.

The libellants call attention to the following circumstances:

First. The stipulation providing for the application of the law of the flag is not valid, (**a**) in being opposed to the public policy of the United States; (**b**) in being linked with unreasonable provisions for the forwarding of the cargo upon unnamed and undesignated steamers, and providing for the application of the law of the *carrying* steamer.

Second: Even if the law of the flag of the *Portuguese Prince* should be applied, the loss would not fall within any of the exceptions of the bill of lading. The exceptions relate to loss through contact with and leakage from the goods of a shipment affecting *other goods of the same shipment;* whereas these goods were damaged by leakage from *other shipments.*

Third: The cases do not fall within the reach of the Harter Act, (**a**) because the bill of lading is a flagrant violation and defiance of the Act; (**b**) because the negligent act related to the preparation of the steamer in port for sea, when the vessel was within the reach and control of her owners.

Fourth: The amounts of damage are very small, the decree in the first case being about $1,200, and in the second case about $500.

Fifth. The points above suggested are elaborated in the briefs used by libellants' counsel in the Circuit Court of Appeals, hereto appended.

WILHELMUS MYNDERSE,
Proctor for Winter and Smillie.

LAWRENCE KNEELAND,
Proctor for Botany Worsted Mills.

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

HENRY P. WINTERS AND CHARLES F. SMILLIE,
Libellants and Appellees

against

JAMES KNOTT,
Respondent and Appellant.

Brief for Libellants, Winters and Smillie.

The libellants were consignees of thirty-nine Bales of Wool shipped on the steamer *Portuguese Prince* at Buenos Aires for delivery at New York. The bales were shipped in good order, but when delivered to the libellants in New York, thirty-seven bales had been damaged by drainage from sugar.

The libellants filed a libel against the respondent James Knott, as the owner of the steamer, to recover the amount of damage to the wool, and their libel was sustained and a decree was entered in their favor. Another shipment of wool, consigned to the Botany Worsted Mills, was damaged to the extent of fifty-two bales, and a libel was filed by the Botany Worsted Mills in respect to such damage. That libel also was sustained.

The actions were tried together in the District Court, and from the decrees entered in the District Court, the ship owner has appealed.

The *Portuguese Prince* was a British steamer, and belonged to the Prince Line. This line traded between New York,

Brazil and the River Plate, touching at some islands of the West Indies. The Line had resident agents in each port, and a resident Superintendent in New York *(Saunders fols. 149, 152.)* It was established in 1892, and its steamers were carriers of general merchandise, receiving and delivering cargo at each port. *(Saunders 151, 153, 155)*

The advertisements of the steamers were under the general name of the Prince Line.

The sugar, from which the drainage came, and also both consignments of wool, were stowed in the between decks forward of the engine room. This compartment was about eighty feet in length, and about thirty-four feet wide. *(Saunders fol. 146.)*

The compartment was, on this voyage, divided by a transverse temporary wooden bulkhead, which stood about in line with the foremast, and divided the compartment about equally. *(Saunders, fols. 107, 148.)* The dividing bulkhead was not a part of the original construction of the vessel but was movable, and in fact was moved about to suit the convenience of cargo. *(Saunders fols. 155, 156.)* There were doors in it. *(Saunders fol. 112.)*

The wool was stowed in the division which was forward of the temporary bulkhead, and ran from the forward part of the compartment to within ten feet of the temporary bulkhead. *(Saunders, fol. 107.)*

The bales were stowed on end, ni e in a row, and from the size of the bales there must have been about ninety in that compartment. *(Saunders, fol. 110.)* There were eighty-nine bales damaged, and Mr. Saunders is therefore in error when he says only three rows were damaged. (Saunders fol. 134.) The wool appears to have been dunnaged. (Saunders fols. 109, 110.)

After leaving Buenos Aires, the steamer proceeded to Santos, Rio, Bahia, and Macio and then to Pernambuco, at which port two hundred tons of crude green sugars were put in the between decks abaft the temporary bulkhead. *(Saunders, fol. 108.)* On arriving in New York the sugars did not reach close up to the temporary bulkhead there being about twenty five feet of vacant space. *(Saunders, fols. 108, 112.)* This may have been due to some of the sugars being removed from that compartment at Trinidad. *(Saunders fol. 113.)*

The sugars were wet and were expected to drain heavily, (Saunders fols. 108, 116, 126, 133.) They were a kind a character of cargo ordinarily taken by the steamers of the line. *(Saunders, fol. 155.)*

The construction of the *Portuguese Prince* was such that if she were on an even keel the drainage would run aft. If she was trimmed six inches by the head, the drainage would still run aft so long as she was stationary, but moving through the water she would, in such trim, and with her natural tendency to dip, carry the drainage forward. *(Saunders fol. 125.)*

When the steamer left Pernambuco, after loading these sugars, she left port trimmed ten inches by the stern and upon arrival at Para, which is the next port, she was still trimmed by the stern. *(Exhibit D, fols. 170, 171.)* She lay at Para ten days discharging cargo, and when she left Para she was trimmed two feet by the head. *(Exhibit D fol. 171.)* She carried this trim upon arrival at the next port, Trinidad, but during her two days stay there, her trim was corrected, and when she left that port she was trimmed one foot by the stern. *(Exhibit D fol. 171.)*

It has been formally admitted that the wool was damaged by drainage finding its way forward through the temporary bulkhead at Para, or between Para and the Port of Spain, the drainage being carried forward by the trim of the vessel *(Exhibit A fol. 167.)*

POINTS

First :

THE HARTER ACT DOES NOT RELIEVE THE SHIP OWNER.

The first section of that Act prohibits the insertion in a bill of lading, of any clauses, covenants, or agreements, relieving the manager, agent, master or owner of any vessel transporting merchandise between ports of the United States and foreign ports, from liability for loss or damage through negligence or omissions in loading, stowing, *caring for* and deliv-

ering cargo, and declares that all such clauses shall be null and void.

The second section prohibits the insertion in any bill of lading, of a covenant or agreement whereby are lessened, weakened or avoided the obligations of an owner to make his vessel seaworthy, or the obligations of a master, or agent to carefully handle and stow and *care for* and deliver cargo.

The third section relieves the ship owner who has exercised due diligence, from responsibility for damage resulting from faults or errors in navigation or management of the vessel.

The Act must necessarily be construed as a whole and the stringent provisions of the first and second sections indicate that the responsibility is left upon the owner of properly stowing and "caring for" the cargo, and that he is relieved from responsibility for damage to cargo only when it comes through navigation and management of the vessel when she is at sea and beyond his control. It is not enough that the cargo is originally properly stowed. The obligation upon the owner is a continuing one. He cannot be relieved from responsibility for the "custody" or "care" of the cargo. *(Section 1.)* Nor can he relieve himself from obligation to "care for" it. *(Section 2.)*

These provisions contemplate not only that the cargo shall be well stowed originally but that due provision shall be made from the outset and shall be continued wherever practicable to maintain it in safety.

When the entire cargo of a vessel is taken at one port, the cargo must at least be properly stowed at the time it leaves port, and it must have all proper surroundings for its protection through the voyage.

When the cargo is loaded in partial lots at successive ports the obligation of good stowage is a recurrent one arising at every port.

It may be admitted that the wool was put on at Buenos Aires suitably dunnaged, to protect it from the dangers then existing. We urge, however, that the owner failed in his duty when, at Pernambuco, he placed substantially in the same compartment with the wool, two hundred tons of wet sugars, with full knowledge that such sugars would drain and that the cargo of wool was protected in respect to such drainage only by the temporary trim of the vessel by the stern. The bulkhead be-

tween the wool and the sugar was no protection, and it was not intended to be a protection. So far as it afforded any appearance of protection to the wool, it was a delusion.

The owner, the master, and the agent all knew that the bulkhead was only temporary in its character, and that it was shifted from place to place to meet the emergencies of loading, and that it had doors.

They were bound to contemplate that through the pitching of the vessel at sea, the sinking of her head while ploughing through the waters, *(Saunders fols. 125, 126)* or by the shifting of weights through receipt or discharge of cargo at later ports, the trim would be from time to time changed, and that thereby the drainage might be thrown forward.

It was negligent stowage to place the wet sugars in close proximity to the wool, with no other protection for the wool, than the temporary trim of the vessel.

It happened that no damage came to the wool at Pernambuco, nor until after arrival in Para ten days later. While at Para the trim of the vessel was so changed, through discharge of cargo, as to send her out from that port nearly two feet by the head, which trim was subsequently maintained for six days, and until after reaching Trinidad *(Exhibit D fols. 170, 171.)*

If the word "seaworthy" relates purely to the condition of the hull, it must certainly relate to the condition of the hull for the purpose of its contemplated use In that aspect, the bulkhead did not make the vessel seaworthy from the transportation of wet sugars and dry wool in the forward between decks.

But unseaworthiness may relate to a condition of loading as well as to a condition of the hull.

Carver Carriage by Sea, Second Edition, Section 18.

The stowage of the wool and the responsibility of the owner in respect thereto was not disposed of by putting the bales in a dry place, and fairly dunnaged at Buenos Aires. The stowage of the wool was changed at every port, not by physical removal of the wool, but in its surroundings.

Certainly it could not be said that the ship owner had discharged his responsibility in respect to the stowage of the wool by putting it on a dry deck well dunnaged at Buenos Aires, if at the next port he had put on it wet and draining cargo

The position of the shipowner under the Act is stated in the *Silvia*—

" Read as a whole, the purpose of the Act manifestly is on " the one hand in the interest of the public to prevent carriers " from evading responsibility, to exercise due diligence in " providing seaworthy vessels and in handling and *care* of " cargo; and, on the other hand, whenever they have exer- " cised due diligence in these respects, to absolve them from " liability for losses arising during the transport from the perils " of the sea and from fault or errors in the navigation or man- " agement of the vessel."

The Silvia 68 Fed. Rep. 230, 233.

The present case differs from that of the *Etona, 71 Fed. Rep. 895;*—In that case the list was given to the vessel through negligent stranding and while in charge of a pilot, while the *Portuguese Prince* took her trim while in a port, a place where the shipowner was represented by an agent. She took a trim which might have been contemplated and which could have been corrected either by the use of her water ballast tanks or by a re-arrangement of cargo. *(Saunders, fols. 128, 129).*

Recent English cases are fully discussed in the opinion of the District Judge;—

The Glenochil (1896) Probate Division 10.
The Ferro (1893) Probate Division 38.
See also *Dobell against S. S. Rossmore Company, (1891) 2 Q. B. 408.*

In this latter case the ship owner was held to be responsible for due diligence on the part of himself and his agents " to make the ship seaworthy *when she starts.*"

Second

THE SHIP OWNER IS NOT RELIEVED BY THE PROVISIONS OF THE BRITISH LAW.

Exemption is claimed by him under the clause of the bill of lading which provides, ;—

" This contract shall be governed by the law of the flag of " the ship carrying the goods."

The ship owner claims that the law of the flag is the British law, and that by such law, the clause exempting him from responsibility for stowage is valid.

But by the first section of the Harter Act, the exemption clauses relied upon are declared null and void, and there is materially nothing therefore upon which the British law, if applicable, can take effect. The stipulation, however, for the application of foreign law is invalid.

Lewisohn vs. National S. S. Co, 56 Fed. Rep. 602 ;
The Silvia, 68 Fed. Rep. 230, 231 ;
The Glenmavis 69 Fed. Rep. 472, 476–
The Brantford City, 29 Fed. Rep. 373, 396 ;
The Hugo, 57 Fed. Rep. 403, 411 ;
The Etona 64 Fed. Rep. 880 ;
The Guildhall 58 Fed. Rep. 796 ;
The Energia 56 Fed. Rep. 124, 127 and 66 Fed. Rep. 604 ;
The Iowa 50 Fed. Rep. 561.

The bills of lading show that the steamers of the Prince Line at times ply to or carry cargo destined for the United Kingdom of Great Britain It may be that as to such cargo the stipulation would be valid.

If the Harter Act is not considered controlling then the provisions of the bill of lading should be determined by the standard of what is "just and reasonable in the eye of the law."

Railroad Co., vs. Lockwood, 17 Wallace, 357, 380, 382

While it might be "just and reasonable" to apply the British law, under a properly framed stipulation therefor, in respect to cargo destined for England, it is not "just or reasonable" to make it applicable to the transportation of cargo from South America to the United States, there being no proof that the law of the country where the shipment was made recognized an exemption from the consequence of negligence as valid while the law of the port of destination is declared against it.

The stipulation for the law of the flag does not, moreover,

fairly and explicitly introduce the British law. The bill of lading provides ;—

" The company reserves the liberty *before shipment* or at " any subsequent period, and so often as may for any cause " be deemed expedient at any place to ship the whole or any " part of said goods by *any other steamer* or vessel *whether* " *belonging to the company or not.*"

And then provides ;—

" This contract shall be governed by the law of the flag of " the ship *carrying* the goods."

It cannot be said that a shipper, receiving such a bill of lading, has made an enforcible stipulation for the application of British law. The bill of lading does not specify the law of any named nation. While shipment was contemplated on a British vessel, the right was reserved to the shipowner, *before shipment* or afterward, of shipping the cargo on any other steamer, of any owner, and of any flag, without notice to the shipper. The shipper could not know the nationality of the *carrying* vessel and cannot be deemed to be bound to the law of its flag.

Such a stipulation is not "just and reasonable in the eye of the law."

Third

THE DECREE OF THE DISTRICT COURT SHOULD BE AFFIRMED, WITH INTEREST AND COSTS, AND A MANDATE SHOULD ISSUE ACCORDINGLY.

BUTLER, NOTMAN, JOLINE & MYNDERSE
Proctors for Libellants

WILHELMUS MYNDERSE.
Advocate.